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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EUGENE NICHOLAS DOLLIVER, III

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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APPELLEE'S BRIEF

1

JURISDICTIONAL STATEMENT

Appellant, Eugene Nicholas Dolliver, III, Fred S. Trend and Ronny Dean Sanderson, were indicted by the Federal Grand Jury for the Northern Division of the Southern District of California, on November 10, 1965, under No. 35485-CD [C. T. p. 2]. ^{1/} The indictment in six counts charged violations of Title 21 U. S. C. §176(a), concealment, transportation and sale of marijuana after illegal importation. Co-defendant Ronny Dean Sanderson had died prior to trial.

^{1/} "C. T." refers to Clerk's Transcript of Record.

On November 15, 1965, appellant was arraigned and entered a plea of Not Guilty; appellant was represented at trial by Court appointed counsel.

On December 13, 1965, the appellant was convicted after a trial by jury of Counts Four and Five of the indictment, Count Six having been dismissed earlier by the trial Court. On January 10, 1966, the appellant was sentenced to the custody of the Attorney General for a period of seven and one-half years on Count Four and Seven and one-half years on Count Five, the sentence on Count five to run concurrent with and not consecutive to the sentence on Count Four [C. T. p. 54].

Jurisdiction of the District Court was founded upon Title 21 U.S.C. §176(a). On January 13, 1966, a timely appeal was taken to this Court pursuant to Title 28, U.S.C. §1291, §1294(1) [C. T. p. 55].

II

PERTINENT STATUTE

Title 21, United States Code, §176(a) provides as follows:

"Notwithstanding any other provision of law, whoever knowingly, with intent to defraud the United States, imports or brings into the United States marijuana contrary to law, or smuggles or clandestinely introduces into the United States marijuana which should have been invoiced, or receives, conceals,

buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marijuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000.

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marijuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

"As used in this section, the term 'marijuana' has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954."

III

STATEMENT OF THE CASE

A. The evidence was sufficient to convict appellant on Counts Four and Five as it proved the appellant was in constructive possession of the marijuana described therein.

B. STATEMENT OF FACTS

1. Counts One, Two and Three of the Indictment do not relate to the appellant Dolliver but charged that on August 26, 1965, defendants Fred S. Trend and Ronny Dean Sanderson concealed, transported, sold and illegally transferred 1419.5 grams of marijuana to Agent Anthony Morelli of the Federal Bureau of Narcotics, knowing that this marijuana had been illegally imported into the United States.

With respect to these first three counts, the evidence reflects that on August 26, 1965, at 1:15 P. M. Agent Morelli met defendants Trend and Sanderson at a bar and had a conversation with them concerning the purchase of marijuana [R. T. p. 50, lines 21-25; p. 51; p. 52, lines 1-14]. ^{2/} Trend, thereafter, left the bar ostensibly to get the marijuana [R. T. p. 52, lines 15-16]. Subsequently, Agent Morelli and defendant Sanderson left the bar and drove in Agent Morelli's car to the Pussy Willow Inn at Woodley and Saticoy Streets [R. T. p. 52, lines 6-10]. Upon parking at the Pussy Willow Inn, the defendant Trend appeared on foot alongside Agent Morelli's car [R. T. p. 54, lines 18-23]. Agent Morelli handed defendant Sanderson \$220.00 for two kilos of marijuana and Sanderson in turn handed, through the open window, the \$220.00 to the defendant Trend [R. T. p. 53, lines 16-25; p. 56, lines 1-8].

Thereupon, the defendant Trend ran from the car, entered

^{2/} "R. T." refers to Reporter's Transcript of Record.

a taxi cab and departed the area [R. T. p. 56, lines 5-11]. Agent Morelli and defendant Sanderson then exited the Agent's vehicle and walked to a 1953 Cadillac parked in the general vicinity [R. T. p. 57, lines 1-3]. Sanderson opened the trunk and delivered to Agent Morelli the marijuana described in Counts One, Two and Three of the Indictment [R. T. p. 57, lines 9-22].

II. Counts Four, Five and Six of the Indictment charged that on August 26, 1965, defendants Fred S. Trend, Ronny Dean Sanderson and the appellant Eugene Nicholas Dolliver concealed, transported, sold and illegally transferred 1919.75 grams of marijuana to Agent Morelli, knowing that this marijuana had been illegally imported into the United States.

At approximately 5:00 P.M. on August 26, 1965, Agent Morelli received a telephone call from Popeye, later described as an informant [R. T. p. 160, lines 1-4; p. 167, lines 8-10], who informed Agent Morelli that he had arranged for Agent Morelli to purchase three kilograms of marijuana. When Agent Morelli inquired of Popeye whether the sale would go through, Popeye stated "yes, I am sure. I will let you talk to the Dude. His name is Nick." [R. T. p. 162, lines 12-18]. Agent Morelli testified another person then talked to him on the phone at which time Agent Morelli asked "Is that you, Nick" to which the person responded "yes" [R. T. p. 162, lines 19-24]. Agent Morelli then had a conversation with Nick at which time the person affirmed he had three kilograms of marijuana to sell, to get down here quickly, and to meet him at the Panorama Bowling Alley [R. T. p. 163, lines 2-7].

At approximately 6:30 P. M. on August 26, 1966, Agent Morelli arrived at the Panorama Bowling Alley where Popeye introduced appellant Eugene Nicholas Dolliver, to Agent Morelli as "Nick" [R. T. p. 142, lines 15-16]. Agent Morelli had a conversation with the appellant in which appellant told Agent Morelli he had three kilos of marijuana to sell and that the price was \$140 per kilogram [R. T. p. 62, lines 20-22; p. 149, lines 9-13]. Appellant then instructed Agent Morelli to wait five minutes and to proceed to the Silver Fox Bar at Roscoe and Sepulveda [R. T. p. 62, line 25 to p. 63, lines 1-3]. The appellant then departed alone from the bowling alley [R. T. p. 63, lines 14-15].

Morelli and Popeye then drove to the Silver Fox Bar where they waited inside the bar. When appellant did not arrive immediately Popeye went out into the parking lot to look for appellant. Popeye returned to the bar to inform Morelli that ". . . Nick is outside waiting for you, he brought his connection with him . . ." [R. T. p. 164, lines 16-23]. When Morelli emerged from the bar he observed appellant with Ronny Dean Sanderson [R. T. p. 64, lines 5-12]. Sanderson then questioned Agent Morelli as to the circumstances of his being present again after their dealing earlier that day [R. T. p. 64, lines 23-25; p. 65, lines 9-14]. After an explanation by Agent Morelli, defendant Sanderson entered the agent's car where Morelli was again directed to the scene of the earlier sale -- the Pussy Willow Inn at Saticoy and Woodley [R. T. p. 62, lines 13-21]. Appellant Dolliver remained at the Silver Fox Bar [R. T. p. 64, line 25; p. 62, line 1].

Shortly after arriving at the Pussy Willow Inn co-defendant Trend again approached the agent's car. Another explanation was given defendant Trend, in Sanderson's presence, by Agent Morelli as to his unexpected return for more narcotics [R. T. p. 66, lines 18-19]. After placating defendant Trend, Agent Morelli attempted to have the purchase price reduced from \$140 per kilogram to \$110 per kilogram -- the amount paid in the morning transaction. Defendant Sanderson at this point told Agent Morelli that he should have dealt through him (Sanderson) as he had to pay other people in between [R. T. p. 66, lines 18-25]. Agent Morelli then handed Sanderson \$490 for the marijuana who, in turn, handed it to defendant Trend [R. T. p. 67, lines 12-18]. Trend thereafter left the location in a taxi cab. Defendant Sanderson and Agent Morelli proceeded to the 1953 Cadillac used in the earlier sale where the marijuana described in Counts Four, Five and Six were delivered by Sanderson to Agent Morelli [R. T. p. 57, lines 24-25; pp. 69-72, line 3].

Agent Morelli then returned to the Silver Fox Bar where Morelli again saw appellant Dolliver who asked "if anything went down all right" [R. T. p. 72, lines 18-21]. Appellant Dolliver left the area separately and Agent Morelli and Popeye departed in the agent's car.

IV

ARGUMENT

A. THE APPELLANT HAD CONSTRUCTIVE POSSESSION OF THE MARIJUANA DESCRIBED IN COUNTS FOUR, FIVE AND SIX.

It is well settled that an Appellate Court in considering the sufficiency of the evidence must view the evidence together with all reasonable inferences in the light most favorable to the Government. Similarly, the verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it.

Noto v. United States, 367 U.S. 290 (1961);

Glasser v. United States, 315 U.S. 60 (1942);

Byrne v. United States, 326 F.2d 825 (9th Cir. 1962).

Contrary to the argument of appellant (Appellant's Brief p. 9, lines 7-12), "constructive possession" may be proved by circumstantial evidence.

" . . . the circumstantial evidence of dominion and control is sufficient to justify a finding by the jury of constructive possession in appellant. . . ."

Hernandez v. United States, 300 F.2d 114, 117
(9th Cir. 1962);

Rodella v. United States, 286 F.2d 306, 312
(9th Cir. 1960);

(9th Cir. 1964).

This Court in Hernandez at p. 117 further stated:

"So long as the evidence establishes the requisite power in the defendant to control the narcotic drugs, it is immaterial that they may not be within the defendant's immediate physical custody, or, indeed, that they may be physically in the hands of the third persons -- 'possession' as used in this statute included both actual and constructive possession. The power to control an object may be shared with others, and hence, 'possession' . . . need not be exclusive, but may be joint."

In the instant case there is an abundance of uncontradicted evidence that appellant, Dolliver, had constructive dominion and control over the marijuana, which he held jointly with his co-defendants Sanderson and Trend.

1. On August 26, 1965, at approximately 5:00 P. M.

Agent Morelli had a telephone conversation with a person identified as "Nick" in which "Nick" stated he had three kilograms of marijuana for sale. The appellant's full name is Eugene Nicholas Dolliver [R. T. p. 163, lines 2-4].

2. The person identified as "Nick" on the telephone

directed Agent Morelli to proceed to the Panorama Bowling Alley [R. T. p. 163, lines 6-7].

3. At approximately 6:30 P. M. on August 26, 1965, Agent Morelli was introduced to the appellant, Eugene Nicholas Dolliver as "Nick" at the Panorama Bowling Alley [R. T. p. 142, lines 15-16].

4. At the Panorama Bowling Alley, Agent Morelli had a conversation with the appellant concerning the amount and price of marijuana. The appellant stated he had "three kilos of marijuana that he was going to sell at \$140 per kilogram" [R. T. p. 62, lines 20-22; p. 149, lines 9-13].

5. At that time, the appellant instructed Agent Morelli to proceed to the Silver Fox Bar [R. T. p. 62, line 25; p. 63, lines 1-3].

6. At approximately 8:00 P. M. Agent Morelli met appellant outside the Silver Fox Bar. At this time appellant, Dolliver, was with co-defendant, Ronny Dean Sanderson [R. T. p. 64, lines 10-12]. Sanderson expressed concern at the unexpected and "odd" appearance of Agent Morelli to purchase more marijuana so soon after their earlier transaction [R. T. p. 64, lines 23-25; p. 65, lines 9-14].

7. The appellant, Dolliver, engaged in a private conversation with co-defendant, Sanderson [R. T. p. 64, lines 19-20].

8. Agent Morelli and co-defendant Sanderson drove to the vicinity of the Pussy Willow Inn where they were met by co-defendant, Fred S. Trend, who upon seeing Agent Morelli, also expressed concern at Morelli's unexpected return for more marijuana. Trend questioned Agent Morelli as to the use of a different

car and why he didn't purchase all the marijuana he desired earlier that day [R. T. p. 66, lines 18-25; p. 67, lines 6-10]. Agent Morelli persisted in his explanation and attempted to persuade Trend and Sanderson to reduce the purchase price per kilogram to the amount he had paid earlier [R. T. p. 66, lines 18-25; p. 67, lines 2-5]. However, the co-defendant insisted on the price originally established by appellant Dolliver, \$140 per kilogram [R. T. p. 66, lines 12-21].

9. Co-defendant Sanderson stated to Agent Morelli that he should have dealt through him directly as he has to pay other people in between [R. T. p. 66, lines 22-25].

10. Agent Morelli, thereafter returned to the Silver Fox Bar where he again saw appellant who asked "if everything went down all right" [R. T. p. 72, lines 18-21].

From the foregoing, it is clear that appellant, not Sanderson or Trend, made the initial contact with Agent Morelli for the sale of marijuana; that appellant established both the quantity of marijuana to be sold and its purchase price; that Agent Morelli was directed to the Silver Fox Bar where he was to meet co-defendant Sanderson by appellant; that the difference in the price from the earlier sale, \$110 per kilogram in which only Sanderson and Trend were involved to \$140 per kilogram most likely represented the appellant's profit from the transaction.

It should be noted that although the appellant states categorically that "later that day Sanderson and Trend divided the money", the record reflects that Trend testified he received only \$100 and

that allegedly the remainder was retained by Sanderson [R. T. p. 305, lines 9-11]. Although Appellant's brief relies on this testimony to raise the inference that Appellant Dolliver must therefore have received none of the proceeds of the sale, such a conclusion can not be drawn from the record. On the contrary the difference in the purchase price and Sanderson's statement that he had to pay others compels an opposite conclusion.

Certainly, the complicity of Appellant, Dolliver, in the instant offense is the same, if not greater than the participation held sufficient in Cellino v. United States, 276 F.2d 941 (9th Cir. 1960).

- (1) In Cellino, the purchasers, Velasquez and Ulrey, approached the defendant to purchase heroin. In the instant case Appellant Dolliver contacted Agent Morelli and initiated the sale of marijuana. Morelli did not seek out Appellant as was the case in Cellino.
- (2) In Cellino, the defendant neither set the price of the narcotics nor the quantity and was not present when the price or quantity was discussed. In the instant case, Appellant Dolliver established both the price and quantity of marijuana to be sold (to the exclusion of the other co-defendants).
- (3) In both Cellino and the instant case, the purchasers were taken to the "connection" by the respective appellants.
- (4) In Cellino, the negotiations to sell only commenced

when the defendant introduced the purchaser to the "connection". In the instant case the negotiations had been completed by the time the "connection" was brought into the scheme.

- (5) In the instant case, the increase in the amount of the purchase price per kilogram over the earlier sale can be attributed to the appellant's participation in the transaction. In Cellino, the defendant was not even aware of what the sale price was at the time of the sale.
- (6) In Cellino, the defendant remained in the vicinity of the sale because he had been transported there in the purchaser's car. In the instant case the appellant remained at the Silver Fox Bar until Morelli returned.

The case of United States v. Jones, 308 F. 2d 26 (2nd Cir. 1962), is also clearly distinguishable from the present fact situation. In Jones, at p. 31, the court relied on the following factors in concluding the defendant had no constructive possession of the narcotics:

- (1) The pains Jones took to locate and find his "connection", indicated that Jones was unable to consummate the transaction as a business dealing of his. In the instant case the transaction had been prearranged. There was no searching for a "connection" to sell marijuana. Appellant knew exactly who his associates were and appeared without delay in the company

of Sanderson at the Silver Fox Bar.

(2) In Jones, the defendant did not discuss the price and place of delivery until the defendant spoke with his "connection". In the instant case, the appellant had arranged the price and quantity of marijuana before Agent Morelli was aware there were others involved in the sale. Once, the other co-defendants did appear on the scene, the price set by appellant did not change.

(3) In Jones, the "connection" instructed the purchaser in the future "not to deal with anyone else". In the instant case no such demand was made of Agent Morelli. It was left solely to Agent Morelli's discretion with whom he would deal in any future transaction.

It does not detract from appellant's facilitation of the sale of the marijuana that appellant was not present at the scene of the transfer of the marijuana. In United States v. Malfi, 264 F.2d 147, 149 (3rd Cir. 1959), the appellant was not even in the same state at the time of the sale. It is not uncommon for one of the parties to a sale to remain behind while another participant takes the purchaser to the cache. United States v. La Rocca, 224 F.2d 859, 860 (2nd Cir. 1955); Brown v. United States, 222 F.2d 293, 297 (9th Cir. 1955).

Clearly, appellant's role in the scheme was not so minor as to fail to support an inference that he shared in the control of the

narcotic drug. Appellant was not an innocent bystander, but one without whose intrusion at its inception and subsequent participation the sale would have never occurred. Hernandez (supra at p. 124).

The fact of the appellant's deep involvement in the scheme to sell marijuana is in no way negated by the momentary concern displayed by co-defendants Sanderson and Trend. This concern was occasioned only by the unexpected appearance of Agent Morelli after Sanderson and Trend had earlier completed a sale of marijuana to him. It did not reflect that appellant could not assure the delivery of the marijuana for in fact the sale was consummated as arranged by appellant. Nor does the fact that Agent Morelli paid the co-defendants \$70.00 more than the agreed purchase price reflect that appellant could not assure delivery. Once again, a more accurate explanation is as Morelli testified, ". . . I had to think of a real quick story to explain how I ended up with another car, and I made an error in counting my money, I gave \$70.00 too much." [R. T. p. 149, lines 2-4]. Had it not been for the bizarre circumstances of the same agent purchasing marijuana twice in the same day from the same offenders the transaction would have been effected without the slightest inquiry exactly as arranged and anticipated by appellant.

Thus, applying the above facts which illustrate the appellant's control over the marijuana, to this Court's construction that the existence of a ". . . possible inference becomes a proper inference of the fact of possession . . . of dominion and control over the marijuana . . . and once made by the trier of fact, and

determined by him to be substantial, clear and convincing proof, such a determination of fact is binding on (this court). " Williams v. United States, 290 F. 2d 451 (9th Cir. 1951); Anthony v. United States, 331 F. 2d 687 (9th Cir. 1964).

V

CONCLUSION

There appearing from the foregoing ample evidence to support the conviction, the appellee respectfully prays that the judgment of conviction be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Robert M. Talcott

ROBERT M. TALCOTT
Assistant U. S. Attorney

